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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1057

LOUIS E. WOLFSON AND ELKIN B. GERBERT,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY

MILTON V. FREEMAN
EDGAR H. BRENNER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioner Gerbert

WILLIAM O. BITTMAN
E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for Petitioner Wolfson

Of Counsel:

ARNOLD & PORTER
JAMES E. KRIER

HOGAN & HARTSON
AUSTIN S. MITTLER
Washington, D.C.

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PRELIMINARY STATEMENT

A reading of the Brief in Opposition reveals that the Government has made an inadequate response to the Petition. The Government is completely unresponsive to one issue and attempts in response to the other to oversimplify the Securities Act of 1933, which was recognized by the trial court as presenting perplexing problems of interpretation and application in this case. (Pet. 18-19) This short Reply Brief is therefore necessary.

ARGUMENT

1. As to Vagueness and Standing

We submit our point on standing (Pet. 23-26) is quite clear—and quite clearly correct. Yet the Government says:

> "Since petitioners claimed that they were ignorant of the registration requirement, they cannot urge that the allegedly ambiguous language of the statute led them to make sales they believed the Act did not cover." (Gov. Brief 12.)

But petitioners have argued that they have standing to attack Sections 4 and 5 as too vague to meet the test that a statute must be certain enough to serve as a guide to fair adjudication. The Government recognizes that this is an applicable test, in addition to the test of fair notice (Gov. Brief 11.), and well it must. As the Court held in *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966):

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.*" (Emphasis added.) See also *Ricks* v. *District of Columbia*, (No. 20,919 D.C. Cir.), December 23, 1968, Slip Opinion pp. 6-7, and Pet. 23-26.

The Government has not even attempted to demonstrate that petitioners lacked standing to attack the statute on this ground. It, like the Court of Appeals, appears to believe that petitioners lacked standing to challenge the constitutionality of Section 4 and 5 of the Securities Act of 1933 because petitioners "knew noth-

ing about" the provisions. (Pet. App. A-6.) But that a defendant had "never heard of" a statute at the time he allegedly violated it has nothing to do with his standing to attack it, not as being too vague to give *notice*, but as too vague to *guide his subsequent trial*. It is submitted that simply being *tried* under a statute gives standing to raise the question of adjudicative vagueness. It would seem that receiving a jail sentence under the statute—as did petitioners—would provide standing.

Petitioners challenged the Court of Appeals' ruling and pointed out its direct conflict with controlling decisions of this Court. (Pet. 23-26.) The Government's failure to respond to petitioners' contention underscores the merit of the claim and is a recognition of the fact that the Court of Appeals was wrong on the issue of standing. The Government in its Brief does not assert that petitioners lacked standing to attack the adjudicative uncertainty of the statute. Rather, it simply asserts in glittering generalities that the statute is not too vague. But this completely misses the point for this issue was never considered by the Court below. Petitioners submit that the Government's evasiveness cannot in any stretch of the imagination be considered an adequate response to the serious constitutional questions presented.

2. As to the Application of Sections 4 and 5

The Government's assertion that the brokers in this case were acting as underwriters (Gov. Brief 7-8.) overlooks the apparent concession of the Court of Appeals that the brokers here were exempt under Section 4(2). And, as we have urged, exempt brokers' transactions are, by definition, not underwriters' transactions. (Pet. 12-13.)

The Government's reliance on the legislative history of the Securities Act of 1933 is misplaced. It was in light of this very legislative history that the Securities and Exchange Commission itself held for 13 years that the Act permitted a broker to sell stock of a controlling person of an issuer in normal brokerage transactions without registration. The Commission's position and its interpretation of the legislative intent was that if the broker-dealer bought for his own account and sold to the public he would be acting as a conventional underwriter and no exemption would be available. On the other hand, the brokerage exemption specifically permitted a broker acting as an agent (or broker)) to sell without registration for his "controlling person" customer. Subsequently, the Commission did a clear about-face in the *Haupt* case. However, for the purpose of acting on this petition it is not necessary for this Court to decide whether the earlier or later interpretation had greater merit. The Court need only recognize, in light of these divergent interpretations, the overriding importance of having this fundamental question of interpretation resolved. In addition, as the Government's brief points out, the *Haupt* decision and the Commission's reinterpretation of the Act were in part based upon the assumption that the broker "would properly be compelled to perform functions beyond those normally exercised by brokers." The testimony in this case makes it clear that the brokers did not exceed the normal brokerage function. (Pet. 12 and n. 11.)

The Government has not even attempted to respond to the contention (Pet. 11-12) that the petitioners themselves were exempt under Section 4(1) because they were not issuers, underwriters or dealers. A con-

trary conclusion strains the plain language of the statute beyond constitutional limits. There is nothing in common sense or the legislative histories to support the position of the Court of Appeals and the Government that Section 4(1) applies only to *transactions,* rather than *persons,* and that Sections 4(2) applies only to *persons,* not *transactions.*

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

MILTON V. FREEMAN
EDGAR H. BRENNER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioner Gerbert

WILLIAM O. BITTMAN
E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue, N.W.
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